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Supreme Court of the United States

October Term, 1935

No. 774

CORINNE S. KOSHLAND,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF *AMICUS CURIAE.*

Motion for Leave to File a Brief as *Amicus Curiae* in Support of Judgment of the Circuit Court of Appeals in Favor of the Respondent.

ROGER S. BALDWIN,
Amicus Curiae,
120 Broadway,
New York City.

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Motion.

Now comes ROGER S. BALDWIN, an attorney and counsellor of this Court, and represents that there is involved in this case the question of the proper interpretation of the provisions of the applicable revenue acts providing that "a stock dividend shall not be subject to tax".

This question vitally affects the interests of four of his clients who are now involved with the Treasury De-

partment in a controversy as to whether or not certain stock dividends received by them are subject to income tax. The stock dividends in question were paid in preferred stock on common stock and the Treasury Department is holding that, under the authority of the Board of Tax Appeals in this and certain recent cases, such stock dividends must be held to be taxable. This, however, is contrary to the previous rulings of the Treasury Department itself. The possible aggregate liability of these four taxpayers under the decision of the Board of Tax Appeals involved in this appeal may amount to as much as $6,000,000.

The decision and opinion in this case may determine the question of the taxability of such stock dividends received by such four taxpayers.

The Solicitor General on behalf of the respondent has no objection to the filing of an *Amicus Curiae* brief herein. The attorney for the petitioner has consented to the filing of the accompanying brief.

Therefore, he prays leave as *Amicus Curiae* to file the brief submitted herewith in support of the affirmance of the judgment of the Court below.

BRIEF *AMICUS CURIAE.*

Opinions Below.

The case was decided by the Board of Tax Appeals in a memorandum opinion which was not published. The opinion of the Circuit Court of Appeals is reported in 81 Fed. (2d) 641.

Question Presented.

Although the actual question involved in this appeal is the basis which the taxpayer should use in determining gain or loss from the sale or other disposition of preferred stock on which dividends in common stock have been received, the fundamental issue is whether dividends paid by a corporation in shares of *its own capital stock* are subject to Federal income taxation.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in this brief under their appropriate headings.

Statement of the Case.

At the beginning of the year 1930, petitioner owned 165 shares of the preferred stock of Columbia Steel Corporation, which she had purchased in the years 1924 and 1926 at a total cost of $14,996.11 (R. 108). The articles of incorporation of the Columbia Steel Corporation provided that its preferred stockholders should be entitled to receive annually dividends of $7 per share, payable in cash, or, at the option of the corporation, in common stock in the ratio

of one share of common stock for one share of preferred. Exclusive voting rights were vested in the common stock (R. 108).

During the period from 1925 to 1928, inclusive, the corporation elected to pay the preferred dividends in common stock, and the petitioner received in those years the aggregate number of 524½ shares of common stock as dividends on her preferred stock (R. 109). In 1930, the corporation redeemed its preferred stock at $105 per share, the petitioner receiving the sum of $17,325 for the 165 shares which she then held (R. 109).

The respondent, in determining the petitioner's gain from this redemption, adjusted her cost basis of the preferred stock by apportioning the cost of $14,996.11 between that stock and the common stock in proportion to their respective values, thereby reducing the cost basis of the petitioner's preferred stock to $11,505.80, and thereby increasing her capital gain (R. 109).

The Board of Tax Appeals, in its memorandum opinion, held that the Commissioner's adjustment was erroneous for the reason that the common stock dividends were not exempt from taxation when received, either under the applicable statutes or under the Constitution and, consequently, that the petitioner taxpayer was not obliged to reduce the actual cost of her preferred stock in arriving at her cost basis for use in determining her gain or loss upon the redemption of such preferred stock (R. 25-32).

The Commissioner appealed to the Circuit Court for the Ninth Circuit, which reversed the decision of the Board on the ground that the common stock was exempt from taxation under the appropriate revenue acts, and sustained the regulations of the respondent requiring the apportionment of the cost between the two classes of stock (R. 108-116).

This brief supports the original decision of the Commissioner and the decision of the Circuit Court for the Ninth Circuit.

Summary of Argument.

During a period of approximately sixteen years following the decision in *Eisner* v. *Macomber,* 252 U. S. 189, in March, 1920, the Treasury Department, through its official regulations, uniformly granted exemption to all dividends paid in stock of the paying corporation.

The first dissenting voice was that of the Board of Tax Appeals in the case of *Tillotson Manufacturing Co.* v. *Commissioner,* 27 B. T. A. 913 (1933), which was affirmed by the Circuit Court for the Sixth Circuit in 76 Fed. (2d) 189 (1935). There was, however, a strong dissenting opinion in the Board of Tax Appeals. That case presented substantially the same question involved in the instant case. In the cases of *Torrens* v. *Commissioner,* 31 B. T. A. 787 (1934), and *Gowran* v. *Commissioner,* 32 B. T. A. 820 (1935), the Board held, either directly or inferentially, that a dividend in preferred stock on common stock distributed when there was outstanding other preferred stock of the same preference and classification, was not entitled to immunity from taxation either under the applicable statutes or under the Constitution. In each of these two cases, also, there was a strong dissenting opinion.

In the *Tillotson* case, the Circuit Court held that the stock dividend there involved was not *constitutionally* exempt from taxation. The decision is silent in regard to the *statutory* exemption. In the instant case, the Circuit Court held that the dividends were exempt from taxation under the applicable provisions of the taxing statute. Consequently the Court did not consider the Constitutional exemption.

This brief maintains the following proposition:

> The challenged stock dividends were exempt from taxation under the applicable provisions of the Revenue Acts of 1924, 1926 and 1928, which expressly provide that a stock dividend shall not be subject to tax.

ARGUMENT.

POINT.

The stock dividends in dispute were expressly exempt from taxation under the Revenue Acts.

The statutes in effect when the stock dividends were received contain the simple and direct legislative command that "A stock dividend shall not be subject to tax" (Section 201 (f), Revenue Acts of 1924 and 1926; Section 115 (f), Revenue Act of 1928).

The term "stock dividend" is of general use in corporate parlance and is universally accepted and understood as meaning a dividend paid by a corporation in shares of its own stock (14 Cor. Juris 812).

Black's Law Dictionary, 3rd ed., page 601, defines a stock dividend as follows:

> "One paid in stock, that is, not in money, but in a proportional number of shares of the capital stock of the company, which is ordinarily increased for this purpose to a corresponding extent."

Thompson on Corporations, 3rd ed., Vol. 7, page 137, Sec. 5263, defines the term as follows:

> "A stock dividend is what the term itself implies, a distribution of the stock of the corporation among the stockholders as a dividend."

In *Hayes* v. *St. Louis Union Trust Co.*, 317 Mo. 1028, the Court said at page 1045:

> "A stock dividend is not in any true sense a dividend at all. The latter implies a *division*, a severance from the corporate assets of the subject of the dividend, and a distribution thereof among the stockholders. * * * The issuance of a stock dividend is, in its last analysis, nothing more than an incident or process in corporation bookkeeping."

In *United States* v. *Siegel*, 52 Fed. (2d) 63, the Court defined this term as follows:

> "A stock dividend is a conversion of surplus or undivided profits into capital stock, which is distributed to stockholders in lieu of a cash dividend. It implies a continuance of the corporation with the same assets and the same liabilities" (p. 65).

The Court of Appeals of the State of New York, in the recent case of *Equitable Trust Co.* v. *Prentice*, 250 N. Y. 1, characterized it as follows:

> "Stock dividends in the true sense, i. e., dividends capitalizing surplus as distinguished from those payable in the stock of a subsidiary * * *, have predominantly the quality of an increment to principal, * * *" (p. 12).

See also *United States* v. *Mellon*, 279 Fed. 910, affd. 281 Fed. 645; *United States* v. *Davison*, 1 Fed. (2d) 465, affd. 9 Fed. (2d) 1022, certiorari denied 271 U. S. 670; *Plainfield Trust Co.* v. *Bowlby*, 107 N. J. Eq. 68; *Whetsel* v. *Forgey*, 323 Missouri 681; *United States Trust Co.* v. *Cowin*, 121 Neb. 427; *Graves* v. *Graves*, 94 N. J. Eq. 268; *Kaufman* v. *Charlottesville Woolen Mills*, 93 Va. 673.

It is a cardinal principle of statutory construction that the language of a statute, if clear and unambiguous, is de-

terminative of its meaning and application. This rule was stated in the case of *Adams Express Co.* v. *Kentucky,* 238 U. S. 190, as follows:

> "It is elementary that the first resort with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction, and the statute is to be taken to mean what it says" (p. 199).

In *Van Camp & Sons Co.* v. *American Can Co.,* 278 U. S. 245, the Court again declared this principle in unmistakable language:

> "The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include" (p. 253).

In *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, the Court said:

> "And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover" (p. 370).

The Treasury Department, in its official regulations and Treasury decisions, and Congress, in its previous Acts, have uniformly applied the term "stock dividend" as meaning a dividend paid by a corporation in shares of its own stock.

This Court held in the case of *Eisner* v. *Macomber, supra,* decided on March 8, 1920, that Congress lacked authority under the 16th Amendment to tax stock dividends. Following the decision in the *Macomber* case, the Treasury Department, on August 4, 1920, issued T. D. 3052, 3 C. B. 38, which reads, in part, as follows:

> "The following applications of the decision of the Supreme Court of the United States in the case of Eisner v. Macomber in the determination of the taxability of dividends declared by corporations are published for the information and guidance of Internal Revenue officers and others concerned:
>
> 1. Where a corporation, being authorized so to do by the laws of the State in which it incorporated, transfers a portion of its surplus to capital account, issues new stock representing the amount of the surplus so transferred, and distributes the stock so issued to its stockholders, such stock is not income to the stockholders, and the stockholders incur no liability for income tax by reason of its receipt."

On August 16, 1920, the Treasury Department issued T. D. 3059, 3 C. B. 38, revoking Articles 1545, 1546 and 1642 of Regulations 45 (1919), and amending Article 1547 of those Regulations to read as follows:

> "Stock received as a dividend does not constitute taxable income to the stockholder, but any profit derived by the stockholder from the sale of such stock is taxable income to him. For the purpose of ascertaining the gain or loss derived from the sale

of such stock, or from the sale of the stock with respect to which it is issued, the cost (used to include also, where required, the fair market value as of March 1, 1913) of both the old and new shares is to be determined in accordance with the following rules:

1. * * *

2. Where the stock issued as a dividend is in whole or in part of a character or preference materially different from the stock upon which the stock dividend is paid, the cost, or fair market value as of March 1, 1913, if acquired prior to that date, of the old shares of stock shall be divided between such old stock and the new stock, or classes of new stock, in proportion, as nearly as may be, to the respective values of each class of stock, old and new, at the time the new shares of stock are issued, and the cost of each share of stock will be the quotient of the cost of the class to which such share belongs divided by the number of shares in that class."

In the Revenue Act of 1921, the first Revenue Act enacted after the decision in the *Macomber* case, Congress expressly declared in Section 201 (d) that "A stock dividend shall not be subject to tax * * *." Thereafter the Treasury Department continued in effect the same Regulations and Decisions which it issued in consequence of the decision in the *Macomber* case. The Regulations interpretative of the Revenue Act of 1921 provided, in part, as follows (Article 1548, Regulations 62 (1922)):

"Stock issued by a corporation as a dividend does not constitute taxable income to a stockholder in such corporation, but gain may be derived or loss sustained by the stockholder from the sale of such stock."

Article 1548 of Regulations 65 (1925), governing the administration of the Revenue Act of 1924, provided, in part, as follows:

> "The issuance *of its own stock* by a corporation as a dividend to its shareholders does not constitute taxable income to such shareholders, but gain may be derived or loss sustained by the shareholders from the sale of such stock." (Italics supplied.)

The Regulations governing the administration of the more recent Revenue Acts are substantially identical with Article 1548 of Regulations 65. (Article 1548, Regulations 69 (1926); Article 628, Regulations 74 (1929); Article 628, Regulations 77 (1933); Articles 115-8, Regulations 86 (1935).).

We find, therefore, that both before and after the enactment of the Revenue Act of 1921, the Treasury Department has construed the term "stock dividend" as meaning any dividend paid by a corporation in its own stock. The Treasury Regulations and Decisions, above cited, establish clearly that the Treasury Department considered that a dividend paid in stock of a classification other than that on which it was paid, was an exempt stock dividend.

There is no indication in any of the Revenue Acts or in any of the Regulations that Congress or the Treasury Department intended to limit the term "stock dividend" to cases where common stock was paid on common stock or where the distribution did not effect a change in the pre-existing interests of the shareholders.

Following the issuance of T. D. 3059 (1920), amending Article 1547 of Regulations 45 (1919), quoted above, the Treasury Department issued O. D. 732, 3 C. B. 39, (1920), giving specific instructions as to the method of adjusting the cost of both classes of stock where preferred stock is issued as a dividend on common stock.

This Court has frequently declared that a statutory term will be construed as synonymous with the previous and contemporaneous interpretation of the Administrative Department of the Government.

In *United States* v. *Falk*, 204 U. S. 143, this Court said:

> "And the Attorney General's opinion cannot be overlooked. The proviso which he construed in Section 50 of the act of 1890 was re-enacted in § 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General, and to change that construction by repeating the very words construed" (p. 150).

Again, in *Provost* v. *United States*, 269 U. S. 443, Mr. Justice STONE stated this principle as follows:

> "We can find in this history no substantial basis for the contention that there was a legislative adoption of any settled administrative construction of the statute adverse to the position now taken by the government. On the contrary, the enactment of the Revenue Act of 1918 without material change of the provision in question must, we think, be taken as indicating a purpose to continue in force the existing law as interpreted by the Attorney General (United States v. Falk, 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 491); and when Congress adopted in the amended Law of 1921 the very suggestion made and rejected two years before, it then intended to effect a change in the law as it had previously existed. Smietanka v. First Trust & Sav. Bank, 257 U. S. 602, 66 L. ed. 391, 42 Sup. Ct. Rep. 223" (p. 458).

The Congress in earlier Revenue Acts had already given a meaning to the term "stock dividend." Section 31 (a) of the Revenue Act of 1917, in so far as is here material, provided as follows:

> "That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, * * * which *stock dividend* shall be considered income to the amount of the earnings or profits so distributed" (Italics supplied).

A similar provision was contained in the Revenue Act of 1916 (Section 2 (a)).

We thus find that both before and after the so-called stock dividend cases, both the Congress and the Treasury Department had accepted the term "stock dividend" as meaning a dividend paid by a corporation in its own stock. The terms "a dividend paid in stock of the corporation" and "stock dividend" are used interchangeably both in the Revenue Acts and in the Treasury Department Regulations (Art. 106, Regulations 33, Rev. (1918); Art. 1545 and Art. 1547, Regulations 45 (1919); Treasury Decision 3052, 3 C. B. 38 (1920)).

Where the Administrative Department of the Government has for a long period of years accepted the statute as meaning just what it says, and Congress, with the knowledge of the meaning given to the language, has repeatedly used the same language in successive Revenue Acts, there should be no question at this late date as to what the language means.

The Circuit Court for the Ninth Circuit based its decision in this case upon the established principle for which we are now contending. The Court said:

> "We are here dealing with revenue acts which expressly exempt all stock dividends from taxation. The question here is not what Congress could tax, but what it has taxed. * * *

> The Tillotson decision, in effect, adds to this section the words 'provided such dividend is already constitutionally exempt from taxation.' This proviso is not found in the Revenue Acts and should not be added thereto by judicial construction.
>
> We hold that the term 'stock dividend,' as used in the Revenue Acts of 1924, 1926 and 1928, embraces all stock dividends, including those paid in common stock of a corporation to holders of its preferred stock. Whether such dividends constitute income, it is unnecessary to decide. If they are not income, they are exempt from taxation under the Sixteenth Amendment. If they are income, they are still exempt by express provisions of these Acts" (R. 112, 113).

In reliance on the plain language of the Revenue Acts and the Rulings of the Treasury Department, many corporations, particularly family corporations, the stock of which is closely held, have paid dividends in stock of a different classification from the stock on which the dividends were declared. Many of the recipients of these dividends will be subject to large additional taxes if the decision of the Board of Tax Appeals in this case is sustained. To assert liability to tax under such circumstances is to say, that a taxpayer acts at his peril in relying upon the simple, direct and unambiguous language of a statute, as interpreted and applied by the Administrative Department of his Government, over a long period of years, with the full knowledge of Congress.

The fundamental fallacy underlying the decisions of the Board and of the Circuit Court for the Sixth Circuit in the *Tillotson* case, as it seems to us, is the assumption that Congress intended to exempt from tax only such special types of stock dividends as under the doctrine laid down in the case of *Eisner* v. *Macomber,* Congress was without constitutional authority to tax.

It is true that the provision inserted in the Revenue Act of 1921 exempting stock dividends from tax was prompted by the decision of the Supreme Court of the United States in the case of *Eisner* v. *Macomber,* but it is unreasonable to impute to Congress the intention that each time the management of a corporation desired to declare a dividend payable in stock, they would have to determine the question as to whether or not the particular stock dividend which they desired to declare was one which was exempt from tax under the Constitution of the United States. If the stock dividend to be declared varied in any substantial degree from the particular type of dividend involved in the case of *Eisner* v. *Macomber,* neither the management of the corporation, the shareholders of the corporation, nor the Administrative Department of the Government could tell with certainty whether such stock dividend would be subject to tax. The administration of the law would become involved in endless chaos and confusion. It is more reasonable to assume that Congress meant just what it said, that "a stock dividend shall not be subject to tax," and that it intended the term "stock dividend" to include any dividend paid by a corporation in shares of its own stock—the meaning which the Treasury Department had uniformly given to the term and which was commonly accepted and understood by the taxpayers.

In arriving at their conclusions in the *Tillotson* case, the Board and the Circuit Court for the Sixth Circuit seem to have assumed that Congress intended to exercise its taxing power to the utmost. Reliance was placed upon certain statements contained in the Reports of the House and Senate of the 67th Congress while deliberating the bill which became the Revenue Act of 1921, which are claimed to indicate that the change in the existing law was being made by reason of the decision of the Supreme Court in the

Eisner v. *Macomber* case. (House Reports No. 350, 67th Congress, First Session, page 8; Senate Reports No. 275, 67th Congress, First Session, page 9.) Reliance upon these reports is not permissible, in view of the clear and certain language of the statute. In the recent case of *Helvering* v. *City Bank Farmers Trust Co.* (Vol. 80—No. 1, p. 1, Law ed. Advance Opinions), Mr. Justice ROBERTS said:

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used" (p. 3).

This Court, in the case of *Smietanka* v. *First Trust and Savings Bank,* 257 U. S. 602, speaking through Mr. Chief Justice TAFT, said:

> "There was indicated in the taxing Act the congressional intention to tax citizens everywhere, and non-citizens, resident in the United States, including persons, natural and corporate, on income from every source, less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. *It may be that Congress had a general intention to tax all incomes, whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it.* Otherwise the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication" (Italics supplied) (pp. 605, 606).

Consideration, however, of other provisions of Sections 201 and 115 of the respective Acts establishes conclusively that Congress intended to exempt all stock dividends from taxation.

Coincident with the enactment of Section 201 (d) of the Revenue Act of 1921, exempting stock dividends from taxation, Congress directed in the same section of the statute that where a corporation proceeds to cancel or redeem stock distributed as a stock dividend at such a time and in such a manner as to make the cancellation or redemption essentially equivalent to the distribution of a taxable dividend, the amount so received shall be treated as a taxable dividend. This provision has been repeated in each of the succeeding Revenue Acts, the only change being that its application was extended in the Revenue Act of 1926 and subsequent Acts to include the cancellation or redemption of stock regardless of whether or not it was issued as a stock dividend (Section 201 (f), Revenue Act of 1924; Section 201 (g), Revenue Act of 1926; Section 115 (g), Revenue Acts of 1928, 1932 and 1934).

Clearly, therefore,—unless we accept the alternative that Congress intended to impose double taxation upon the issuance of a stock dividend and its subsequent redemption or retirement,—an inference always to be avoided (*Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532), we are forced to the conclusion that Congress, in enacting the Revenue Act of 1921 and each of the succeeding Acts, deliberately intended to exempt all stock dividends from the burden of taxation. We submit, therefore, that it is entirely immaterial whether Congress decided to exempt all stock dividends because it believed itself lacking in constitutional authority or for some other reason of public policy.

The successive reenactments of the statutory provision exempting a stock dividend from taxation are persuasive evidence of legislative approval of the administrative construction of such provisions.

Beginning with the Revenue Act of 1921, Congress has reenacted the statutory provision exempting a stock dividend from taxation in six consecutive Revenue Acts (Section 201 (d), Revenue Act of 1921; Section 201 (f), Revenue Acts of 1924 and 1926; Section 115 (f), Revenue Acts of 1928, 1932 and 1934).

The Treasury Department during this period of fourteen consecutive years has uniformly held in its official Regulations, Treasury Decisions and rulings that all stock dividends—that is, dividends paid by a corporation in its own stock—are entitled to the statutory exemption. (Articles 3 and 106, Regulations 33 (revised) (1918); Article 1545, Regulations 45 (1919); Article 1548, Regulations 62 (1922), 65 (1925) and 69 (1926); Article 628, Regulations 74 (1929) and 77 (1933); Article 115-8, Regulations 86 (1935). T. D. 3059, 3 C. B. 38 (1920); T. D. 3010, 3 C. B. 25 (1920); T. D. 3052, 3 C. B. 38 (1920); O. D. 732, 3 C. B. 39 (1920); O. D. 735, 3 C. B. 40 (1920); O. D. 859, 4 C. B. 24 (1921); O. D. 801, 4 C. B. 24 (1921); Solicitor's Opinion, 144, C. B. I-2, p. 4 (1922); A. R. R. 1127, C. B. I-2, p. 8 (1922); I. T. 1930 C. B. III-1, p. 39 (1924); T. D. 3553 and T. D. 3554, C. B. III-1, p. 38 (1924); I. T. 1900, C. B. III-1, p. 82 (1924); G. C. M. 916, C. B. VI-1, p. 135 (1927); I. T. 2449, C. B. VIII-1, p. 101 (1929); I. T. 2455, C. B. VIII-1, p. 218 (1929); G. C. M. 6709, C. B. VIII-2, p. 132 (1929); I. T. 2538, C. B. IX-1, 144 (1930).

The decision in I. T. 2538 (1930) is of particular importance because it involves substantially similar facts as were present in the *Tillotson* and instant cases—a common stock

dividend on preferred stock. The opinion contained in G. C. M. 6709 (1929) also is of importance because the situation there considered was the same as in the *Torrens* and *Gowran* cases.

It is a well established rule of statutory construction frequently relied upon by this Court in the interpretation of a taxing statute, that the administrative construction of a statute receives explicit sanction and approval by the repeated reenactments of the statute without change or modification. In *National Lead Co.* v. *United States*, 252 U. S. 140, this Court declared this principle as follows:

> "During all the intervening twenty-four years this rule of the Department with respect to drawbacks had been widely applied to many articles of much greater importance than linseed or its derivatives, and the practice was continued, linseed included after 1894, until the petition in this case was filed. The reenacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute (*United States* v. *Philbrick*, supra; *United States* v. *Falk*, 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532), for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government (*United States* v. *Bailey*, 9 Pet. 238, 256, 9 L. ed. 113, 120)" (pp. 146, 147).

Again, in *Brewster* v. *Gage*, 280 U. S. 327, this Court expressed its opinion in the following forceful language:

> "The substantial re-enactment in later acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the

> regulation. * * * The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them" (p. 337).

In *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, the Court unequivocally stated this rule:

> "We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. * * * And we have decided that the re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction" (p. 339).

See also *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269; *Ramsey* v. *Commissioner*, 66 Fed. (2d) 316.

A case of particular importance because it reverses a decision of the Board which modified the consistent and uniform treatment of worthless debts on the part of the Treasury Department is *Commonwealth Commercial State Bank* v. *Lucas*, 41 F. (2d) 111. In its opinion, the Court of Appeals for the District of Columbia said:

> "In the present case, the contemporaneous and continued interpretation by the Treasury Department was both equitable and reasonable, and apparently met with the approval of Congress, as otherwise we must assume there would have been a change in the wording of the statute. There is no cogent reason for now adopting the more technical interpretation which the Board has placed upon the statute" (p. 113).

The administrative construction of a statute is entitled to great weight.

As we have seen, the official Regulations of the Treasury Department, the rulings known as Treasury Decisions, Office Decisions, Solicitor's Opinions, Income Tax Rulings and General Counsel's Memoranda, all officially published with the endorsement of the Treasury Department, have uniformly and unqualifiedly granted exemption to all dividends paid by a corporation in its own stock, irrespective of whether the dividend was paid in common stock on preferred stock, or in preferred stock on common stock, whether or not there was outstanding other preferred stock of the same preference and classification as the dividend stock.

This Court has frequently held that, if a statute is challenged as ambiguous or uncertain, the contemporaneous administrative interpretation will be held effective unless it is inconsistent with the statute, or leads to an unreasonable and absurd result. This rule is well expressed by Mr. Justice ROBERTS in the recent case of *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, in the following language:

> "The regulations were made pursuant to express authority (see Sec. 1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. *United States* v. *Grimaud*, 220 U. S. 506, 517, 518, 55 L. ed. 563, 567, 568, 31 S. Ct. 480; *International R. Co.* v. *Davidson*, 257 U. S. 506, 514, 66 L. ed. 341, 346, 42 S. Ct. 179. They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons. *United States* v. *Moore*, 95 U. S. 760, 763, 24 L. ed. 588, 589; *Brewster* v. *Gage*, 280 U. S. 327, 336, 74 L. ed. 457, 462, 50 S. Ct. 115" (p. 378).

In *Brewster* v. *Gage, supra,* this Court again declared this principle in unmistakable language. The Court said:

> "These regulations were prepared by the department charged with the duty of enforcing the acts. The rule so established is reasonable and does no violence to the letter or spirit of the provisions construed. A reversal of that construction would be likely to produce inconvenience and result in inequality. It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons" (p. 336).

See also *Maryland Casualty Co.* v. *United States,* 251 U. S. 342.

Conclusion.

The decision of the Circuit Court for the Ninth Circuit, below, is correct and should be affirmed.

Respectfully submitted,

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Dated April 25, 1936.